

No. 10319

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See 9945

United States
Circuit Court of Appeals
For the Ninth Circuit.

VIRGINIA DAVIS HARTMAN and MARGA-
RET DAVIS RICHARDSON,
Appellants,
vs.

BANK OF AMERICA NATIONAL TRUST &
SAVINGS ASSOCIATION,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

DEC 28 1942

PAUL P. O'BRIEN,
CLERK

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VIRGINIA DAVIS HARTMAN and MARGA-
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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G. D. SCHILLING, Esq.,
LOUIS FERRARI, Esq.,
MESSRS. KEYES AND ERSKINE,
625 Market Street
San Francisco, California
Attorneys for Defendant and Appellee.

In the District Court of the United States in and for the Northern District of California, Southern Division.

Civil No. 21021-R

VIRGINIA DAVIS HARTMAN and MARGARET DAVIS RICHARDSON,

Plaintiffs,

vs.

HAROLD F. DAVIS, BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION et al.,

Defendants.

STIPULATION AS TO BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION

It is hereby stipulated and agreed by and between the attorneys for plaintiffs and the attorneys for defendant, Bank of America National Trust & Savings Association, that, on the filing of the mandate of the Circuit Court of Appeals for the Ninth Circuit in the above-entitled case dismissing without prejudice the appeal heretofore taken by plaintiffs from the minute order of the above-entitled Court sustaining the motion to dismiss of said defendant, Bank of America National Trust & [1*] Savings Association, the above-entitled Court having made and entered its minute order on May 28, 1941,

*Page numbering appearing at foot of page of original certified Transcript of Record.

granting said motion to dismiss, with leave to plaintiffs of twenty days within which to amend, and plaintiffs declining and having failed to further amend said second amended complaint, the attorneys for said defendant Bank may file a final order, judgment and/or decree granting said motion to dismiss plaintiffs' second amended complaint.

San Francisco, California, September 16, 1942.

MARSHALL B. WOODWORTH,
RUSSELL P. TYLER,

Attorneys for Plaintiffs.

LOUIS FERRARI,
KEYES & ERSKINE,

By MORSE ERSKINE,

Attorneys for Defendant, Bank
of America N. T. & S. A.

So Ordered:

A. F. ST. SURE,
U. S. District Judge.

[Endorsed]: Filed Sep. 17, 1942. [2]

In the District Court of the United States in and
for the Northern District of California, South-
ern Division

No. 21021-R

VIRGINIA DAVIS HARTMAN and MARGA-
RET DAVIS RICHARDSON,

Plaintiffs,

vs.

HAROLD F. DAVIS, et al.,

Defendants.

ORDER AND DECREE DISMISSING ACTION
AS TO ONE DEFENDANT

Bank of America National Trust and Savings Association, one of the defendants in the above entitled action, having made a motion to dismiss the second amended complaint of the plaintiffs in the said action as against the said Bank, and this court having made an order dismissing the said complaint but granting the said plaintiffs leave to amend, and the said plaintiffs having refused to amend.

Now, Therefore, it is hereby Ordered, Adjudged and Decreed that the said second amended complaint of the plaintiffs as against the said Bank be and the same hereby is dismissed.

Dated: September 16, 1942.

A. F. ST. SURE,

District Judge.

[Endorsed]: Filed Sept. 17, 1942. [3]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Now come Virginia Davis Hartman and Margaret Davis Richardson, the plaintiffs in the above-entitled suit, and hereby appeal from the final order and judgment of the above-entitled Court made and entered on the 16th day of September, 1942, sustaining the motion to dismiss of the defendant, Bank of America National Trust & Savings Association, to plaintiffs' Second Amended Complaint; that said defendant, Bank of America National Trust & Savings Association, is the appellee; that said appeal is being taken to the United States Circuit Court of Appeals for the Ninth Circuit.

San Francisco, California.

RUSSELL P. TYLER,

MARSHALL B. WOODWORTH,

Attorneys for Plaintiff and Appellants.

Receipt of Service.

[Endorsed]: Filed Oct. 22, 1942. [4]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know all men by these presents: That we, Virginia Davis Hartman and Margaret Davis Richardson, as principals, and New Amsterdam Casualty

Company, as sureties, are held and firmly bound unto Bank of America National Trust & Savings Association, in the full and just sum of Two Hundred and Fifty (\$250.00) Dollars to be paid to the said Bank of America National Trust & Savings Association, its certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seal and dated this 8th day of October, 1942 in the year of our Lord One Thousand Nine Hundred and Forty Two.

Whereas, lately as a District Court of the United States, for the Northern District of California, Southern Division, in suit depending in said Court, between Virginia Davis Hartman [5] and Margaret Davis Richardson, plaintiffs and appellants, and Bank of America National Trust & Savings Association, defendant and appellee, an order and judgment sustaining the motion to dismiss of Bank of America National Trust & Savings Association, defendant and appellee, was rendered against the said Virginia Davis Hartman and Margaret Davis Richardson, plaintiffs and appellants, and the said Virginia Davis Hartman and Margaret Davis Richardson, plaintiffs and appellants, having filed a notice of appeal, as required by law, to reverse the order and judgment in the aforesaid suit, to the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, in the State of California;

Now, the condition of the above obligation is such, that if the said Virginia Davis Hartman and Margaret Davis Richardson, plaintiffs and appellants, shall prosecute their appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

This recognizance shall be deemed and construed to contain the "express agreement" for summary judgment, and execution thereon, pursuant to the law, rules and statutes in such instances made and provided for and/or pursuant to Rule 34 of the said District Court.

[Seal] NEW AMSTERDAM CASU-
ALTY COMPANY.

By M. A. BAILEY,
Attorney-in-Fact.

Acknowledgment of Surety Company.

[Endorsed]: Filed Oct. 22, 1942. [6]

[Title of District Court and Cause.]

REQUEST FOR RECORD ON APPEAL

To the Clerk of the above-entitled Court and to the Bank of America National Trust & Savings Association, defendant and appellee, and to Messrs. Keyes & Erskine, attorneys for said defendant and appellee, San Francisco, California:

Kindly prepare certified copy of following papers for the appeal in the above-entitled case between the above-mentioned parties: (1) Stipulation filed

September 17, 1942, in re Bank of America mandate; (2) Order and decree re motion to dismiss second amended complaint; (3) Notice of appeal of October 22, 1942; (4) Bond for costs on appeal; (5) Statement of points on which appellants intend to rely; (6) Copy of this request for record on appeal.

This is in addition to the papers contained in Transcript of Record in case No. 9945 in the United States Circuit Court of Appeals for the Ninth Circuit between the same parties as are in- [7] volved on this second appeal which, by agreement of the attorneys for the respective parties on this appeal, are deemed to be and made part of the present appeal as well as the original complaint and the first amended complaint now on file, by stipulation of the parties, with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit in case No. 9945 above referred to.

San Francisco, Calif., October 23, 1942.

MARSHALL B. WOODWORTH,
RUSSELL P. TYLER,

Attorneys for Plaintiffs and
Appellants.

Receipt of the within Request for Record on Appeal is hereby acknowledged by copy this 23rd day of October, 1942.

KEYES & ERSKINE,

Attorneys for Defendant and
Appellee.

[Endorsed]: Filed Oct. 23, 1942. [8]

[Title of District Court and Cause.]

DESIGNATION OF ADDITIONAL PORTIONS
OF THE RECORD, PROCEEDINGS AND
EVIDENCE TO BE INCLUDED IN REC-
ORD ON APPEAL

To the District Court of the United States, in
and for the Northern District of California:

Bank of America National Trust and Savings As-
sociation, the defendant and appellee, hereby desig-
nates additional portions of the record, proceed-
ings and evidence to be included [9] in the record
on appeal in the above entitled matter.

Consequently, in addition to those matters des-
ignated by the appellants, you will please prepare
and transmit to the United States Circuit Court,
Ninth Circuit, a true copy of the following papers,
records, proceedings and evidence to be contained
in the record on appeal in said matter, to-wit:

1. Original complaint filed on September 12,
1939.

2. First amended complaint filed on February
20, 1940.

Dated: October 28, 1942.

MORSE ERSKINE,
G. D. SCHILLING,
LOUIS FERRARI,
KEYES & ERSKINE,

Attorneys for Defendant and
Appellee.

[Endorsed]: Filed Oct. 31, 1942. [10]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH AP-
PELLANTS INTEND TO RELY ON AP-
PEAL

(Assignments of Error)

Now come the plaintiffs and appellants and serve and file their statement of the points on which they intend to rely on the appeal as follows:

I.

That the Court erred in sustaining the motion to dismiss of the defendant and appellee, Bank of America National Trust & Savings Association, the plaintiffs' and appellants' second amended complaint.

II.

That the Court erred in holding and deciding that the plaintiffs' and appellants' second amended complaint did not state a cause of action as against defendant and appellee, Bank of America National Trust & Savings Association. [11]

III.

That the Court erred in holding and deciding that the plaintiffs' and appellants' second amended complaint did not set forth any facts showing or tending to show extrinsic fraud by and against defendant and appellee, Bank of America National Trust & Savings Association.

IV.

That the Court erred in holding and deciding that the plaintiffs' and appellants' cause of action, as set out in the second amended complaint, was barred by the Statute of Limitations as against the defendant and appellee, Bank of America National Trust & Savings Association.

Wherefore, the plaintiffs and appellants pray that the order and judgment of the above-entitled Court made and entered on the 16th day of September, 1942, sustaining the motion to dismiss of the defendant and appellee, Bank of America National Trust & Savings Association, to plaintiffs' and appellants' Second Amended Complaint, be reversed.

San Francisco, Calif.

RUSSELL P. TYLER,

MARSHALL B. WOODWORTH,

Attorneys for Appellants.

Receipt of the within Statement of Points On Which Appellants Intend to Rely on Appeal is hereby acknowledged by copy this 8th day of October, 1942.

MORSE ERSKINE,

KEYES & ERSKINE,

Attorneys for Appellee.

[Endorsed]: Filed Oct. 22, 1942. [12]

[Title of District Court and Cause.]

STIPULATION AS TO CERTAIN PORTIONS
OF RECORD DESIGNATED BY APPELLEE

In view of the fact that (1) original complaint filed on September 12, 1939, and (2) first amended complaint filed on February 20, 1940, heretofore filed in the above-entitled action, have already by stipulation of the parties been certified by the Clerk of the above-entitled Court as part of the record on appeal on the previous appeal, dismissed without prejudice to a further appeal, in case No. 9945 between the same parties, it is hereby stipulated and agreed that the Clerk of the above-entitled Court need not prepare and/or transmit to the United States Circuit Court of Appeals, Ninth Circuit, a true copy of the (1) original complaint filed on September 12, 1939, and (2) first amended complaint filed on February 20, 1940.

San Francisco, Calif., November 2, 1942.

MORSE ERSKINE,

G. D. SCHILLING,

LOUIS FERRARI,

Attorneys for Defendant and
Appellee.

Attorney for Plaintiffs and
Appellants.

[Endorsed]: Filed Nov. 3, 1942. [13]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 13 pages, numbered from 1 to 13, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Virginia Davis Hartmen, et al, Plaintiffs, vs. Harold F. Davis, et al, Defendants, No. 21021-R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Two-Dollars and Fifteen-Cents (\$2.15) and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 27th day of November, A. D. 1942.

[Seal] WALTER B. MALING,
Clerk.

WM. J. CROSBY,
Deputy Clerk. [14]

[Endorsed]: No. 10319. United States Circuit Court of Appeals for the Ninth Circuit. Virginia Davis Hartman and Margaret Davis Richardson, Appellants, vs. Bank of America National Trust & Savings Association, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed November 30, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 10319

VIRGINIA DAVIS HARTMAN and MARGA-
RET DAVIS RICHARDSON,

Appellants,

vs.

BANK OF AMERICA NATIONAL TRUST &
SAVINGS ASSOCIATION, et al.,

Appellee.

DESIGNATION OF RECORD TO BE
PRINTED AND STATEMENT OF POINTS
RELIED UPON

To Clerk of Circuit Court of Appeals and Messrs.
Keyes & Erskine, Attorneys for Appellee, San
Francisco, Calif.:

Now come the appellants and designate, pursu-
ant to the rules of the above-entitled Court, the rec-
ord to be printed on the appeal and hereby re-
quest, direct and designate that all of the transcript
on appeal as certified be printed; and further state
that they will rely upon each, every and all of the
statements of points and assignments of error in-
cluded and set forth in the certified transcript on
appeal.

Dated: December 3, 1942, San Francisco, Calif.

MARSHALL B. WOODWORTH,
RUSSELL P. TYLER,

Attorneys for Appellants.

Receipt by copy of the above Designation of Record to Be Printed etc. is hereby admitted this 3rd day of December, 1942.

KEYES & ERSKINE,

Attorneys for Appellee, Bank
of America N.T.S.A.

[Endorsed]: Filed Dec. 4, 1942.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION AS TO TRANSCRIPT
AND BRIEFS

It is hereby stipulated and agreed by and between the attorneys for appellants, Virginia Davis Hartman and Margaret Davis Richardson, and the attorneys for appellee, Bank of America National Trust and Savings Association, that the transcript of record on the present appeal may be, and is, hereby supplemented by the transcript of record in Case No. 9945 in the United States Circuit Court of Appeals for the Ninth Circuit between the same parties appellants and appellee and that the same is hereby made part of the transcript of record on the present appeal;

And it is further hereby stipulated and agreed that the record on the present appeal shall be deemed to include all other papers and exhibits heretofore filed on said appeal in Case No. 9945, whether printed as part of the transcript in that case or not;

And it is further stipulated and agreed that the briefs of respective counsel for appellants and appellee in Case No. 9945 shall be deemed and considered and filed as the briefs on the present appeal, subject to the right of respective counsel to file such further or supplemental briefs as they may be advised, with the permission of the court.

MARSHALL B. WOODWORTH,
RUSSELL P. TYLER,

Attorneys for Appellants.

MORSE ERSKINE,
LOUIS FERRARI,
KEYES & ERSKINE,
GEORGE D. SCHILLING,

Attorneys for Appellee, Bank of
America National Trust
and Savings Association.

So Ordered:

CURTIS D. WILBUR,
Senior U. S. Circuit Judge.

[Endorsed]: Filed Dec. 4, 1942.

